IN THE SUPREME COURT OF THE STATE OF MISSOURI

SC 86788

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In the Interest of:	)	
	)	SC 86788
H.L.L.	)	

AMICUS CURIAE BRIEF

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Jurisdictional Statement

The Missouri Supreme Court has jurisdiction of this case pursuant to Rule 83.02 and this Court's Order accepting transfer after the opinion issued by the Southern District, In the Interest of H.L.L. on April 8, 2005.

Statement of Facts

As the author of the Amicus brief is familiar with the facts only as they are set forth in the Opinion from the Southern District Court of Appeals, the Legal File and Transcript; the Statement of Facts set forth by the Appellant is herein adopted.

Points Relied on with Authority

I. Wherein the trial court erred when it did not set aside its judgment within thirty days of issuing its ruling because the question of proper service must be decided within the context of strict scrutiny and due process guaranteed by the Missouri and United States Constitutions.

A. The parent-child relationship is fundamental.

Troxel v. Granville, 530 U.S. 57, 65 (2000)

Stanley v. Illinois, 405 U.S. 645, 651 (1972)

Santosky v. Kramer, 455 U.S. 745 753 (1982)

K.A.W. and K.A.W., 133 S.W.3d 1, 12 (Mo. banc 2004)

B. Rule 75.01 defines the jurisdiction of the trial court post judgment.

Streett, Inc. v. Elliott, 753 S.W.2d 115, 117 (Mo. App. E.D. 1988)

Myers v. Pitney Boews, Inc., 914 S.W.2d 835, 838 (Mo. App. 1996)

In re Marriage of Williams, 847 S.W.2d 896, 900 (Mo. App.

Missouri Rules of Civil Procedure Rule 75.01

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C. The evidence supports the contention that proper service of Appellant has been called into question.

Loveheart v. Loveheart, 762 S.W.2d 32, 35 (Mo. banc 1988)

Shapiro v. Brown, 979 S.W.2d 526, 528 (Mo. App. E.D. 1998)

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i. Original Service is facially defective

Crain v. Crain, 19 S.W.3d 170, 173 (Mo. App. W.D. 2000)

Missouri Revised Statutes Section 211.453

Missouri Revised Statutes Section 506.150

Missouri Revised Statutes Section 506.160

Missouri Revised Statute Section 506.130

Missouri Rules of Civil Procedure Rule 54.02

Missouri Revised Statutes Section 211.031

Missouri Revised Statutes Section 211.447

ii. Abode service upon Appellant was likewise defective.

Collins. v. Scholz, 373 A.2d 200, 201 (Conn. Supp. 1976)

Newman v. Greeley State Bank, 92 Ill. App. 638, 639 (Ill. App. 1901)

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Holly v. Holly, 151 S.W.3d 148, 150 (Mo. App. 2004)

Missouri Revised Statutes Section 211.455

iii. As an out-of-state resident, service upon Appellant was improper.

Russ v. Russ, 39 S.W.3d 895, 899 (Mo. App. E.D. 2001)

Missouri Rules of Civil Procedure Rule 54.14

Missouri Rules of Civil Procedure Rule 54.20

iv. Rule 43.01 would require service by summons in this case.

K.A.W. and K.A.W., 133 S.W.3d 1, 12 (Mo. banc 2004)

Missouri Rules of Civil Procedure Rule 43.01

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v. Guidance is needed interfacing S.M.H. with the juvenile courts.

In the Interest of S.M.H., 160 S.W.3d 355,361 (Mo. banc 2005)

Missouri Revised Statutes Section 211.031

Missouri Revised Statutes Section 211.447

Argument

Standards of Review

Standard of Review when the Trial Court Denies Setting Aside a Default Judgment

The trial court has the discretion to set aside a default judgment, and its decision will not be interfered with unless an abuse of discretion is found. *Myers v. Pitney Boews, Inc.*, 914 S.W.2d 835, 838 (Mo. App. 1996). The discretion not to set aside a default judgment, however, is a good deal narrower than the discretion to set one aside. *Id*.; *Crain v. Crain*, 19 S.W.2d 170, 174 (Mo. App. W.D. 2000). Thus, appellate courts are more likely to reverse a judgment which fails to set aside a default judgment than one which grants that relief. *Myers*, 914 S.W.2d at 838. This is because of the law's distaste for default judgments and its preference for trials on the merits. *Id*.

Standard of Review for Termination of Parental Rights' cases

The juvenile court's decision to terminate parental rights will be affirmed unless, as here, it is not supported by substantial evidence, it is against the weight of the evidence, *or it erroneously declares or applies the law. In re K.C.M.*, 85 S.W.3d 682, 689 (Mo. App. W.D. 2002).

The constitutional implications of a termination of parental rights also inform the standard of appellate review. The bond between parent and child is a

fundamental societal relationship. *K.A.W. and K.A.W.*, 133 S.W.3d 1, 12 (Mo. banc 2004). Those faced with forced dissolution of their parental rights have a more critical need for protections than do those resisting state intervention into ongoing family affairs. *In the Interest of M.D.R.*, 124 S.W.3d 469, 472 (Mo. banc 2004). The termination of parental rights has been characterized as tantamount to a "civil death penalty." *K.A.W.*, 133 S.W.3d at 12; *In re N.R.C.*, 94 S.W.3d 799, 811 (Tex. App. 2002); *In re Parental Rights as to K.D.L.*, 58 P.3d 181, 186 (Nev. 2002).

Because parental rights are a fundamental liberty interest, statutes that provide for the termination of parental rights are strictly construed in favor of the parent and preservation of the natural parent-child relationship. *In the Interest of S.M.H.*, 160 S.W.3d 355, 361(Mo. banc 2005).

Standard of Review for Constitutional Issues

Statutory interpretation is an issue of law that this Court will review *de novo*. *Blakely v. Blakely*, 83 S.W.3d 537, 540 (Mo. banc 2002). Missouri courts start with the presumption that a statute is constitutional. *Id*. It will not be invalidated unless it "clearly and undoubtedly" violates some constitutional provision and "palpably affronts" fundamental law embodied in the Constitutions. *Id.*

I. Wherein the trial court erred when it did not set aside its judgment within thirty days of issuing its ruling because the question of proper service must be decided within the context of strict scrutiny and due process guaranteed by the Missouri and United States Constitutions.

A. The parent-child relationship is fundamental.

The parent-child relationship is a fundamental liberty interest protected by the constitutional guarantee of due process. In fact, it is one of the oldest fundamental liberty interests recognized by the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). It includes the right of a parent to make decisions concerning the child's care, custody and control. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

This fundamental liberty interest of natural parents in raising their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the state. *Santosky v. Kramer*, 455 U.S. 745 753 (1982). Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. *Id.* If anything, persons faced with forced dissolution of their parental rights have a more critical need for protections than do those resisting state intervention into ongoing family affairs. *Id*.

The termination of parental rights has been characterized as tantamount to a "civil death penalty." *K.A.W.*, 133 S.W.3d at 12. Therefore any such termination must be accomplished in accordance with the requisites of the Due Process Clause. *Santosky*, 455 U.S. at 753. Consequently, when reviewing a trial court's termination of parental rights, appellate courts must examine the trial court's findings of fact and conclusions of law as well as its ruling on post-trial motions closely; statutes and rules that provide for the termination of parental rights are strictly construed in favor of the parent and preservation of the natural parent-child relationship. *K.A.W.*, 133 S.W.3d at 12 (Mo. banc 2004).

Because parental rights are a fundamental liberty interest, statutes that provide for the termination of parental rights are strictly construed in favor of the parent and preservation of the natural parent-child relationship. *S.M.H.*, 160 S.W.3d at 361. The termination of parental rights is the exercise of an awesome power, and should not be done lightly. *Id*. The decision to terminate such rights, therefore, will be reviewed closely. *Id*.

B. Rule 75.01 defines the jurisdiction of the trial court post judgment.

> Rule 75.01 Judgments, Control by Trial Court, reads in pertinent part:
>
> The trial court retains control over judgments during the thirty-day period after entry of judgment and may, after giving the parties an opportunity to

be heard, and for good cause, vacate, reopen, correct, amend, or modify its judgment within that time.

Appellate courts throughout Missouri have held that although trial courts retain control for thirty days after entry of judgment and may amend it under Rule 75.01, reasonable notice and an opportunity to be heard must be given to the party or parties affected by the court's intended actions. *Streett, Inc. v. Elliott*, 753 S.W.2d 115, 117 (Mo. App. E.D. 1988)(citing *Terre du Lac, Inc., v. Black*, 713 S.W.2d 18, 21 (Mo. App. E.D. 1986).

Reasonable notice is that which is suitable to the case or such notice or information of a fact as may fairly and properly be expected or required in the particular circumstances. *Streett*, 735 S.W.2d at 117. The purpose of such notice is that the party to be affected adversely may appear for his own protection and to afford opportunity for a litigant to present his views as to matters instantly before the court which may affect his rights. *Id*. The "good cause" standard as set for in both Rule 75.01 and 74.05(d) has been found to be satisfied in default proceedings as long as the party in default did not recklessly or intentionally impeded the judicial process. *Myers*, 914 S.W.2d at 839.

It is common place in the trial courts in Missouri that a civil judgment given against a party in default will be readily set aside for most any reason including the party finding an attorney post judgment or one complaining that notice was not proper. *Myers*, 914 S.W.2d at 838. In most instances this is based upon the public policy and the common law doctrine that parties have a right to be

heard on issues affecting their rights. *In re Marriage of Williams*, 847 S.W.2d 896, 900 (Mo. App. 1993). Whether the outcome of the court's ruling changes or not is not the driving force; it is a matter of giving the party the opportunity to be heard which is paramount.

Here, Appellant faces the final termination of his parental rights. Appellant was not served correctly as prescribed by law and was unrepresented by counsel at the time of the termination hearing. Therefore, he did not challenge the jurisdiction of the trial court due to improper notice and service. However, the evidence shows that during the thirty-day period covered by Rule 75.01 he obtained counsel who filed two post trial motions to set aside the judgment which raised the issues of service and notice. (L.F. 16-18, A. 11-13). There is no allegation that Appellant in any way recklessly or intentionally impeded the judicial process by his actions. Because of the irrevocable nature of a termination of parental rights actions and the allegations of improper service, "good cause" has been show. Appellant, who has now obtain counsel, merely asks the court for the opportunity to be heard on the issue.

C. The evidence supports the contention that proper service of Appellant has been called into question.

At the outset, we observe that it is fundamental that a restriction upon parental rights be in accordance with due process of law. *Loveheart v. Loveheart*, 762 S.W.2d 32, 33-34 (Mo. banc 1988). And the first requirement of due process

is that a defendant be given sufficient notice that his rights are to be challenged in the courts. *Id*. "Notice to the defendant is essential to the jurisdiction of all courts." *Id*. The rights of a party may not be adjudicated in the absence of notice to that party of the litigation. *Id*.

A judgment entered against a party by a court lacking personal jurisdiction over such party is void. *Shapiro v. Brown*, 979 S.W.2d 526, 528 (Mo. App. E.D. 1998). A default judgment, being void due to lack of jurisdiction, remains void forever, and any kind of proceeding to cancel it is proper. *Id*. It is the duty upon any court to make a determination as to if it has jurisdiction to proceed before rendering judgment against a party and appellate courts review matters of jurisdiction *de novo*. *Bounds v. O'Brien*, 134 S.W.3d 666, 670 (Mo. App. E.D. 2004).

First the brief will discuss the ways in which the process of service was defective. After which we will discuss how the summons, with the generic Rights Form attached, does not comport to the level of notice needed under the strict scrutiny established for a termination of parental rights hearing. Finally, it will discuss the Court's recent ruling in *In the Interest of S.M.H.* and how it calls into question the relationship and/or independence of Sections 211.031 and 211.447.

i. Original service is facially defective.

Section 211.453 requires that in termination of parental rights cases, service shall be made by way of *summons* pursuant to Sections 506.150 (summons and

petition), 506.160 (service by mail and publication) and 506.130 (summons shall be signed by the clerk – contents). Section 506.130 has been superseded by Rule 54.02. *Crain*, 19 S.W.3d at 173.

Since it is obligatory that service be perfected personally by way of summons if a party's whereabouts are ascertainable, Rule 54.02 controls. Rule 54.02, Summons Shall Be Signed by Clerk, provides in pertinent part that:

> …It also shall state the time within which and the place where the defendant is required to appear and defend as provided by law and **shall notify the defendant that in case of failure to do so judgment by default will be entered against the defendant for the relief demanded in the petition**. (Emphasis added)

A review of the summons served in the case here (L.F. 39, A. 9) reveals that it fails to comport with Rule 54.02 in that it does not tell T.L. the consequences of failing to appear for the February 25, 2004 hearing. It does not tell T.L. that if he does not attend that hearing that default will be entered against him for the relief demanded in the petition. (L.F. 40, A. 10).

Further, the summons simply advises that there has been a petition filed alleging that the child, H.L.L., is subject to the jurisdiction of the court for reasons set forth in the petition. However, as T.L. and H.L.L. have both been parties to previous proceedings, with different cause numbers, confusion clearly arises as to what actions are taking place against the rights of T.L. The summons does not advise T.L. to which petition it is referring.

The Rights Form, which is meant to inform T.L. of his rights during the pendency of the proceedings, nowhere mentions that a petition to terminate parental rights has been filed. The Rights Form concludes with this advisement:

> (7) If the division finds the facts in the petition to be true, it may make orders affecting the juvenile and his custodian concerning the care, custody and control of the juvenile and the division may commit the juvenile to an institution.

It is likely that the Rights Form (L.F. 40, A. 10) is used for both Sections 211.031, abuse and neglect cases, and 211.447, termination of parental rights cases. The Rights Form does not identify which petition it is designed to accompany; nor does the Rights Form advise a recipient about whether or how the recipient's rights can be affected. Here, it is clear, that T.L. cannot be held to understand what kind of orders may be issued from the court. *The Rights Form indicates that order issued may affect the juvenile and his custodian; neither of which are Appellant*.

ii. Abode service upon Appellant was likewise defective.

Service upon Appellant was allegedly perfected by means of "abode service." Whether a particular place is the usual place of abode of a defendant is a question of fact. Although the sheriff's return is prima facie evidence of that fact stated therein, it may be contradicted and facts may be introduced to show otherwise. *Collins. v. Scholz*, 373 A.2d 200, 201 (Conn. Supp. 1976); *Newman v.*

Greeley State Bank, 92 Ill. App. 638, 639 (Ill. App. 1901). Absent proper service, any judgment rendered over a party is void. *Rodriquez v. Rodriquez*, 975 S.W.2d 485, 488 (Mo. App. 1998); *Holly v. Holly*, 151 S.W.3d 148, 150 (Mo. App. 2004). The rights of a party may not be adjudicated in the absence of notice to that party of the litigation. *Loveheart v. Loveheart*, 762 S.W.2d 32, 35 (Mo. banc 1988).

Here the evidence calls into question the perfection of service. The Summons for Personal Service outside the State of Missouri (L.F. 39 – 40, A. 9-10) shows that service was allegedly left at a particular location thought to be Appellants regular place of dwelling. However, there is no indication as to who may or may not have received service as no name is listed. (L.F. 39, A. 9). Close examination of the Return (L.F. 39, A. 9) shows that since a party has not been named as receiving service, no service can be achieved. *O'Hare v. Permenter*, 113 S.W.3d 287, 289 (Mo. App. E.D. 2003).

Evidence introduced by Appellant's attorney now further calls into question the process of service and notice of the proceedings. (L.F. 16-30, A. 11-13). As a question of fact, which was the basis for the jurisdiction of the court to continue with the termination, the natural parent should be afforded the opportunity to be heard on the issues of notice and service. The trial court is required to make the determination of whether there was proper service and notice with the backdrop of the fundamental nature of the parent-child relationship. Section 211.455.

iii. As an out-of-state resident, service upon Appellant was improper.

Rule 54.14, Personal Service Outside the State, governs the requirements for service on out-of-state residents. It provides in pertinent part:

> Personal service outside the state shall be made: (1) By a person authorized by law to serve process in civil actions within the state or territory where such service is made, or by the deputy of a person so authorized;

Rule 54.20 (b) states in pertinent part:

> Every officer to who summons or other process shall be delivered for service outside the state shall make an affidavit before the clerk or judge of the court of which affiant is an officer or other person authorized to administer oaths in such state stating the time, place and manner of such service, the official character of the affiant, and the affiant's authority to serve process in civil actions within the state or territory where such service was made.

Here, T.L. was an out of state resident and therefore Rules 54.14 and 54.20 apply. First, the return fails to identify upon whom it was served. The line to indicate the name of the person upon whom service was made is simply blank. (L.F. 39, A. 9). Due to this omission, it cannot be ascertained whether the person was 1) a family member or 2) over the age of 15.

Further, the person who allegedly made the service was the only person who signed the return of service. (L.F. 39-40, A. 9-10). Rule 54.14 requires that a

person must be authorized by law to make service. Rule 54.20 requires that the officer make an affidavit before the clerk or judge of the court of which the affiant is an officer or other person authorized to administer oaths in such state. *Russ v. Russ*, 39 S.W.3d 895, 899 (Mo. App. E.D. 2001). Here, there is no evidence that the party serving the papers made an oath to a court officer or authorized party of the state. In fact, the evidence shows that the only person that may have made marks on the Summons seems to be "manigo." This evidence calls into question proper service.

iv. Rule 43.01 would require service by summons in this case.

Likewise, Rule 43.01 provides that all pleadings must be served upon a party affected thereby unless the party is in default "…except that pleadings asserting *new or additional claims* for relief against them shall be served upon them in the manner provided for by service of summons." (emphasis added) As discussed above, while we contend that Appellant is not in default because of the summons on its face violates Rule 54.02, a petition for termination of parental rights **is** a new or additional claim for relief that would preclude the application of default against Appellant.

A petition to terminate parental rights constitutes a new or additional claim even though the Green County Juvenile court had previously adjudicated H.L.L. as an abused or neglected minor. An essential part of any determination whether to terminate parental rights is whether, considered at the time of the termination and

looking to the future, the child would be harmed by a continued relationship with the parent. *K.A.W.*, 133 S.W.3d at 9. It is, however, insufficient merely to point to past acts, note that they resulted in abuse or neglect and then terminate parental rights. *Id*.

Findings supporting earlier determinations are not irrelevant, but they must be updated to address the extent to which they describe the time of the termination and the potential for future harm. *Id*. To that end, a trial court cannot support a termination by merely incorporating earlier finds supporting is assumption of jurisdiction or some other earlier disposition. *Id*.

The assumption of jurisdiction and disposition phases each have statutory grounds for their petitions, standards of proof and specific relief available. The intent behind each of these Sections does not contemplate parental termination. It is only after all efforts have failed that grounds may exists for termination and thereafter it still must be held that it is in the best interest of the child to do so. The grounds plead and the relief sought by the State change once a petition for termination of parental rights is filed.

By analogy, in a dissolution of marriage case, a party initiates the cause of action by filing a petition pleading certain facts required by various statutes and asks for specific relief. If, after the initial petition is filed, the party has to amend the petition raising questions of paternity of the children, disposition of their custody (shared custody switching to sole custody), or property rights of real and/or marital property, the opposing party must be personally served with an

amended petition. Therefore it is clear that a termination of parental rights petition alleges new and additional claims for relief against the party and therefore he/she shall be served with a petition in the manner provided for by service of summons.

v. Guidance is needed interfacing *S.M.H.* with the juvenile courts

The case before the Court provides an opportunity for it to clarify and make certain for the parents before the juvenile courts and the practitioners of the State the distinctive character and differences between Secs. 211.031 and 211.447. In its opinion the Court stated "[t]here is nothing inconsistent between *Brault's* recognition that proceedings to terminate parental rights are considered independent civil actions for some purposes, and a holding herein that they are not independent civil actions" for others. In the recent *S.M.H.* ruling, this Court found that there was at least one commonality between the two Sections; it declared that a petition to terminate parental rights is a supplemental petition for purposes of Rule 126. *S.M.H.*, 160 S.W.3d at 361.

Parties and practitioners need certainty as to the legal standards they are proceeding under. While it is true that in many cases filed under Secs. 211.031 and 211.447 share the same case number during the pendency of their proceedings; each is also a separate and distinct cause of action. Each has been debated during the legislative process. Each cause of action was given a different statutory number to show its separateness. Each has pleading standards. Each has its own standard of proof and what evidence will prove the elements plead. Each

has distinct relief opportunities the State or the parties may be afforded. Each has its own process for review of its findings. Therefore each requires due process; service, notice and hearing.

Parents coming into contact with the Children's Division (formerly DFS) and the Juvenile Courts are told to trust the system as their children are being taken from their homes. They are assured that reunification is the goal. They are encouraged not to seek the advice of counsel as this is "only" a hearing on abuse and neglect. The commonalities, recently recognized by this Court, should not be used as a springboard for further fusion of these two very distinct causes of action.

Conclusion

It should be found that the trial court lacked jurisdiction to hear this case and therefore it should be reversed. Service upon Appellant was void and the trial court lacked the authority to render judgment and abused its discretion by not setting aside its judgment.

Respectfully submitted,

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Certification

I herby certify that

1. This brief is in compliance with Rule 55.03

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